Circuit Court for Baltimore City
Case No. 115357024

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2632

September Term, 2016

GEORGE JOHNSON

v.

STATE OF MARYLAND

Eyler, Deborah S.
Friedman,
Wilner, Alan M.
(Senior Judge, Specially Assigned

JJ.

Opinion by Wilner, J.

Filed: November 17, 2017

Appellant was convicted by a jury in the Circuit Court for Baltimore City of several drug and firearm offenses, for which he was sentenced to an aggregate of twelve years in prison. He complains in this appeal that the court erred (1) in declining to suppress certain identification evidence, (2) in declining to give a "missing evidence" instruction, (3) in declining to grant a new trial based on improper comments made by the prosecutor in his closing argument to the jury, and (4) in giving an improper *Allen* charge.

THE IDENTIFICATION EVIDENCE

On November 25, 2015, Sergeant Anthony Maggio, Detective Jason Blanchard, and Detective Michael Gause, of the Baltimore City Police Department, were on patrol together when they received a report from a police dispatcher that there were four males in the rear alley of 800 North Belnord Avenue with a gun and narcotics, followed by a report from Officer Rafiu Makanjuola, a uniformed patrol officer, that he had stopped four individuals matching the description given by the dispatcher.

Sergeant Maggio who, along with Detectives Blanchard and Gause, were members of a special unit that investigated narcotics and gun crimes in an area of the city that included North Belnord Avenue, was familiar with that block. He knew that there were vacant houses on it and that the surrounding area was an open drug market. The three officers drove to the scene to provide backup assistance.

When they arrived, the four suspects were sitting on a curb, and Officer Makanjuola was in the process of preparing citizen contact receipts for them.[1] Detective Blanchard recognized two of the four, including appellant, whom he had seen in the neighborhood, and observed that appellant seemed to be agitated and was speaking loudly to the uniformed officers who were there. After additional officers arrived, Sergeant Maggio, accompanied by Detective Blanchard and one or more other officers, went to the alley to investigate the report of drugs or guns being stored there.

Sergeant Maggio knew from earlier covert observations that the vacant house at 816 North Belnord Avenue was used to store drugs and firearms. He checked the rear door of that house and, finding it unlocked, entered the house, observed that it was unoccupied, and walked through it. While in the front part of the basement, Sergeant Maggio discovered a hole in the ceiling by moving a piece of wood that had been covering the hole. Reaching into the hole, he found a loaded handgun and 33 gel capsules containing suspected heroin. In the rear of the basement, he discovered another hole in the ceiling, which he was able to reach by climbing on top of a table or workbench. Inside that hole, he found five plastic bags, each with four grams of

[1] A Citizen/Police Contact Receipt is a Baltimore City Police Department three-copy form that is filled out by an officer who has contact with a member of the public. Among other things, it identifies the officer and the individual, states the primary reason for the contact, describes the incident or violation that led to the contact, and recites any action taken by the officer. There is space on the form for the name, address, phone number, date of birth, race, gender, ethnicity, and driver's license number of the individual. The original goes to the Department's central records. One copy is given to the individual, and the officer keeps a copy.

suspected cocaine, two bags each containing 29 clear gel caps of suspected heroin, and 50 gel caps of suspected heroin. He took the contraband up to the second floor and, anticipating that the owner of the items may return to retrieve them, radioed Detective Blanchard that he intended to stay in the house.

After the other officers left the scene, Sergeant Maggio heard someone enter the house through the back door and go into the basement. He heard some "rustling" in the front part of the house and what sounded like the person "fiddling" with the piece of wood that he had moved to expose the hole in the ceiling. When that stopped, he heard the person yell that someone had "stole all my stuff," accompanied by an expletive. Maggio then heard the person "stomping" to the back of the basement, followed by what sounded like jars and cans falling off the table that he had used to reach the hole in that part of the basement. That was followed by more yelling that someone had stolen "my stuff."

Sergeant Maggio phoned Detective Blanchard and directed him to come to the house, but before Blanchard could arrive, the person in the basement "stomped up the steps and stormed out of the house" through the front door. From the clothing and physical appearance of the man he saw flee, Maggio believed that he had seen the man before and that it was appellant, but he wasn't entirely sure. A few minutes later, Maggio heard someone enter the house through the front door, go into the front part of the basement, and, as before, yell in a voice similar to the one Maggio had heard earlier, "I can't believe they got my stuff," accompanied by an expletive. Those sounds were

followed by sounds indicating that the person had climbed on the work bench in the rear part of the basement which, in turn, was followed by more yelling "I can't believe they stole my stuff." Detective Maggio notified the other detectives that the suspect had returned to the house and directed them to return as well to effect an arrest.

As the detectives approached the back door, Maggio heard the person slam that door and run to the front of the house. Sergeant Maggio reached the stairs in time to see the person run out of the front door with Detective Blanchard in pursuit. Blanchard confirmed that, after the second call from Sergeant Maggio, he and Detective Gause entered the house through the back door and moved to the center of the house where he came face-to-face with a person he identified in court as appellant. Blanchard said they were only five to six feet from each other – "it was like a deer in headlights." Appellant ran out of the front door. Blanchard pursued him for several blocks but eventually lost sight of him. Detective Blanchard said that, during the chase, the suspect turned and looked back at him, allowing the detective to see his face a second time. He immediately recognized the man as one of the four at the earlier stop. Blanchard said that he had paid attention to appellant at the stop because he was particularly agitated and hostile and Blanchard had seen him in the neighborhood on earlier occasions.

Detective Blanchard said that, although he recognized appellant's face, he did not know appellant's name. He arranged for Officer Makanjuola to meet him and bring copies of the citizen contact forms he prepared for the four men he had stopped. Blanchard entered the names of the four men into "Arrest Viewer," a database containing

booking photographs and other information regarding persons who had been arrested. He looked at all four photographs but, when he saw appellant's photograph, he was "a hundred percent sure" it was the person he had seen in and chased out of the Belnord Avenue house. He identified appellant at trial.

The gel caps found in the Belnord Avenue house were tested and found to contain heroin, cocaine, or both. The handgun also was tested and found to be operable. Detective Gause, testifying as an expert in the recognition of controlled dangerous substances, opined that, based on the number of the gel caps and their street value of $3,000 to $4,000, the gel caps found in the vacant house were intended for sale.

Against this evidence was the testimony of Keisha Tolls, who had lived at 818 North Belnord Avenue at the time. Testifying for appellant, she said that, while sweeping in front of her house on November 25, she saw "a guy" running out of the vacant house next door with two officers in pursuit, but she was "positive" that "the guy" was not appellant.

Although in a pretrial omnibus motion of the kind that the Court of Appeals has criticized on several occasions[2] appellant claimed, without any supporting facts, that Detective Blanchard's identification of him was impermissibly suggestive, he mentions that contention only in passing in his brief in this appeal. The only complaint supported

[2] *See Denicolis v. State*, 378 Md. 646, 660 (2003); *Edmund v. State*, 398 Md. 562, 569 (2007); *Ray v. State*, 435 Md. 1, 15 (2013).

by any substantial evidence was in the context of an asserted discovery violation – that the State failed to produce in a timely manner the four citizen contact forms that had been requested, the names of the four individuals whose photographs Detective Blanchard had viewed on the "Arrest Viewer," and the photographs of three of those individuals.

To the extent that the impermissibly suggestive argument is before us, we find no merit in it. Detective Blanchard's identification of appellant did not come from any skewed lineup or show-up but from (1) having seen appellant in the neighborhood, (2) having appellant's attention drawn to him by his agitated behavior when being questioned by Officer Makanjuola, (3) having seen him close-up during the encounter in the house, and (4) having seen his face again during the chase.

With respect to the discovery issue, when that issue was raised at the suppression hearing, which occurred the day before trial, the court ordered the prosecutor to provide defense counsel with copies of the citizen contact forms and booking photographs that Detective Blanchard used to identify appellant. The next day, the prosecutor provided the forms and photographs of the three men other than appellant who had been detained. Nonetheless, appellant moved that the court *either* exclude Detective Blanchard's pretrial identification *or* grant "broad leeway" to cross-examine the testifying officers about the citizen contact forms.

Defense counsel complained that the photographs she belatedly received showed that one of the other three men "resembled" appellant, which therefore tended to negate appellant's guilt by casting doubt on the certainty of Detective Blanchard's identification.

She also complained that the photographs produced were supplied by the prosecutor from his own viewing of the "Arrest Viewer" without any evidence that those were the photographs that Detective Blanchard had viewed. Her argument was that "not only was production untimely, it was, in fact, never completed."

After noting that Detective Blanchard's identification was based on his own observations of appellant and that the relevance of the photographs was only to supply appellant's name, the court denied the motion to suppress the identification but did grant the alternate relief of allowing broad leeway in cross-examining any police officers who testified.

Notwithstanding that the court granted appellant's alternate remedy, he now complains, in a footnote, that that was insufficient. We disagree. Md. Rule 4-263(n) provides a range of permissible sanctions for failure to comply with discovery in a criminal case, including prohibiting the party from introducing in evidence the matter not disclosed "or any other order appropriate under the circumstances." The choice of sanction, if any, is largely within the discretion of the trial court. The Rule does not require the court to take any particular action or any action at all. *Thomas v. State*, 397 Md. 557, 570; *Bellard v. State*, 229 Md. App. 312, 340 (2017), *aff'd* 452 Md. 467 (2017). We find no abuse of the court's discretion in this case.

MISSING EVIDENCE INSTRUCTION

The missing evidence of which appellant complains was his own citizen contact form. As noted, in response to appellant's failure-to-provide-discovery complaint, the court ordered the prosecutor to produce the citizen contact forms and photographs. The prosecutor produced those documents for the three other men detained by Officer Makanjuola but not the contact form and photograph of appellant. Defense counsel complained mostly about the untimeliness of the receipt of what she got but also complained about not receiving the form or photograph relating to appellant. Her point seemed to be that, those documents *might* show that appellant was not one of the four men – that the photograph *might be* of someone else and that the name on the fourth contact form also *might be* someone else's. She requested a missing evidence instruction, which the court declined to give.

The actual instruction requested is not clear from the record. The judge referred to Instruction 3.26 in the Maryland Criminal Pattern Jury Instructions published by the Maryland State Bar Association, which deals with the concealment or destruction of evidence by a *defendant*, and it speaks of the circumstances in which the concealment or destruction of evidence by a defendant may be regarded as evidence of guilt or consciousness of guilt. In contrast, Criminal Pattern Jury Instruction 3.29, which deals with a missing *witness*, either for the State or the defendant, permits an inference that the testimony of that witness would have been unfavorable to the one who could have produced the witness. In further contrast is Maryland Civil Pattern Jury Instruction 1:16 captioned Spoliation, which provides:

> "The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party."

The Court of Appeals first dealt with the import or effect of this contrast in *Patterson v. State*, 356 Md. 677 (1999), where the defendant unsuccessfully sought a "missing evidence" instruction similar to that stated in Instruction 3.29, namely, that where evidence – in that case a jacket – that was peculiarly within the power of the State to produce but was not produced and its absence was not sufficiently accounted for, the jury may decide that the evidence would have been unfavorable to the State. The drugs that Patterson was being tried for possessing were found in a pocket of the jacket, which the police found in the trunk of Patterson's car. The State did not retain the jacket because it concluded that the jacket itself had no evidentiary value. In its place, the State offered a photograph of the jacket in the trunk.

The Court analyzed the issue of whether a "missing evidence" instruction was required from the perspective of Federal due process (and the Maryland Constitutional analog) and substantive evidence law and concluded that neither mandated the requested instruction. In light of the Supreme Court's ruling in *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Court concluded that such an instruction was not required as a matter of due

process, under either the Federal or the Maryland due process provision, unless bad faith was shown on the part of the State and that no such showing had been made by Patterson.

The issue under Maryland evidence law was whether a "missing evidence" instruction was within the scope of Md. Rule 4-325(a), which requires a judge to instruct the jury at the conclusion of all of the evidence. That Rule has been interpreted as requiring an instruction, upon request, "where (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Cost v. State*, 417 Md. 360, 368-69 (2010); *Derr v. State*, 434 Md. 88, 133 (2013); *Preston v. State*, 444 Md. 67, 81-82 (2015). All three of those decisions make clear, however, that, although Rule 4-325(a) has been interpreted to *require* trial courts to give an instruction when that three-part test is met, "the decision whether to give a jury instruction is 'addressed to the sound discretion of the trial judge . . . unless the refusal amounts to a clear error law.'" *Preston*, at 82, *Derr*, at 133, *Cost*, at 369. The issue, then, is whether, or when, a "missing evidence" instruction really is required and not merely discretionary.

The *Patterson* Court noted that it had never directly mandated the giving of a "missing evidence" instruction and concluded that, although trial courts must instruct the jury on applicable law, "[g]enerally, they need not instruct, even when requested or when the facts might support the inference, on the presence or absence of most evidentiary inferences, including 'missing evidence' inferences." 356 Md. at 694.

The Court looked at the issue again in *Cost v. State, supra*. The defendant, an inmate in a State prison, was charged with stabbing a fellow inmate in the fellow inmate's cell. Photographs taken of the cell after the attack showed a red substance on the floor and on towels and bedding in the cell, which the State contended was blood but Cost suggested was Jello. The towels and bedding were collected and, for a time, held as evidence but later were destroyed, and the cell floor was washed before the substance could be examined. As had Patterson, Cost asked for a "missing evidence" instruction, which was denied.

The Court confirmed its conclusion in *Patterson*, based on *Youngblood*, that, in a criminal case, a "missing evidence" instruction is required as a matter of due process only if there is evidence of bad faith on the part of the State and that, as a general rule, such an instruction is not mandated as a matter of Maryland evidence law. "*Patterson,*" the Court stated, "presented the 'general' or 'typical' case, likely to be repeated, in which some piece of crime scene evidence, not of major import, was not retained or analyzed. It makes sense to hold, as *Patterson* did, that juries should not be instructed by the judge to wander down most pathways of evidentiary inference negative to the state based on evidence that is cumulative or not material and not usually collected by the police." *Id.*at 380.

The situation in *Cost* was different, however, and not typical. In contrast to the jacket at issue in *Patterson*, which was never collected as evidence and was not likely to be used as evidence even if it had been collected and preserved, the stained linens and

clothing and the red substance on the floor "certainly would contain highly relevant evidence with respect to the crime for which Cost is charged, which normally would be collected and analyzed." *Id.* Indeed, the Court noted that those items actually were held as evidence, until they were destroyed. Given the fact that Cost claimed that the substance found in the cell was not blood but Jello, that evidence, the Court concluded, may well have created a reasonable doubt as to Cost's guilt and could not be considered as cumulative or tangential. Accordingly, it was error not to give the instruction; merely allowing counsel to argue the point was not sufficient. Careful that its holding not be misconstrued, however, the Court advised:

> "Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, recommit the decision to the trial court's discretion, but emphasize that it abuses its discretion when it denies a missing evidence instruction and the 'jury instructions, taken as a whole, [do not] sufficiently protect the defendant's rights" and 'cover adequately the issues raised by the evidence.'"

This Court has applied *Cost* in at least two reported Opinions. In *Gimble v. State*, 198 Md. App. 610 (2011), the defendant, being pursued by police in a high-speed chase, crashed his car, severely injuring himself and causing contents of the car to be strewn around the immediate area of the crash. One of those items was a backpack that contained narcotics and paraphernalia, a cell phone, and a comb. The backpack was recovered and held as evidence, separately from the narcotics, but was mistakenly destroyed, along with its remaining contents, by a deputy sheriff as part of a routine purging of evidence lockers.

Gimble requested a "missing evidence" instruction, which was denied. Although not contending that the backpack was Constitutionally material, he argued on appeal that it was "potentially useful" and "highly relevant." Although agreeing that the backpack was potentially useful, this Court concluded that it was not central to Gimble's defense and was not the type of evidence that ordinarily would be tested and used at trial, and thus determined that the trial court had not abused its discretion in refusing to give the instruction.

A year later, the Court had before it *Hajireen v. State*, 203 Md. App. 537 (2012). Two issues were presented in that sexual-abuse-of-a minor case – whether the trial court erred in refusing to admit a recording of statements made by the child victim to a social worker, which were partly consistent and partly inconsistent with the child's trial testimony, and whether the defendant was entitled to a "missing evidence" instruction. This Court reversed the judgment of conviction on the first ground but addressed the second because there might be a retrial.

The request for a "missing evidence" instruction arose from a video recording of the defendant's interrogation by the police. The video portion was available, but, because of either a malfunction of the recording machine or human error in activating it, there was no audio portion. The defendant regarded the absence of the audio portion as requiring a "missing evidence" instruction. This Court disagreed, holding that "[a] missing evidence instruction, advising the jury that it could infer that the missing evidence would be

unfavorable to the State, is not warranted in a situation where evidence was not destroyed, but rather, it was never created." *Id.* at 561.

With this background, we find no error of law and no abuse of discretion in the trial court's refusal to give the requested instruction in this case. If the missing evidence – the citizen contact forms and the appellant's photograph – had any potential use at all, it was marginal at best. As we have indicated, Detective Blanchard's identification of appellant was not based on any of those documents, but rather on his having seen appellant face-to-face (1) while observing him during the defendant's initial detention by Officer Makanjuola, (2) from earlier observations of him in the neighborhood, (3) from the face-to-face confrontation in the house, and (4) from a face-to-face observation during the chase. The contact forms and the accompanying photograph were important only so the officer could attach a name to the face he already had recognized.

WITNESS-VOUCHING AND DNA COMMENTS

During his closing argument, the prosecutor attempted to compare the credibility of Ms. Tolls – the defense witness who testified that the man she saw running from the house next door was not appellant – and the police officers. "[E]ither she's lying or the police are lying," he said. He then proceeded to tell the jury:

> "I don't think the police are lying because they told you what they did."
>
> "I'm putting my trust in [the police] because they have no interest in the outcome."

> "[The police are] not going to ruin their reputations and their careers to put someone in jail who wasn't there."
>
> "[The police are] not going to say I'm a hundred percent sure it was George Johnson unless they're a hundred percent sure it's George Johnson because if they're caught lying, they loose [*sic*] their jobs and they get charged."
>
> "Now, let's look on, what happens to Ms. Tolls? Nothing, she walks away, she's gone. She's here, she's lying for a drug dealer who uses a gun to facilitate his drug sales on the 800 block of North Belnord. And it's going to come down to credibility and who you choose to believe."

Defense counsel objected. The court agreed that the statements were improper, but, instead of instructing the jury to ignore those remarks, the court instructed the prosecutor to confess his error, which he did. He acknowledged to the jury that his remarks regarding the police officers were inappropriate and that "it's irrelevant what I believe, and I want you to disregard the fact that I said I believe the testimony of the police officers. I want you to make this determination based on the facts presented to you and how you find each witness to be credible." The court asked defense counsel whether she was satisfied with that response, and she said that she was.

In her closing argument, defense counsel concentrated on attacking Detective Blanchard's identification and the way the police handled the matter generally. She pointed out that they did not photograph the scene, there was no crime lab investigation, no search for evidence from cameras in the area, no DNA evidence, no fingerprints. It was a sloppy investigation. If the jury believed Ms. Tolls, she said, it must acquit.

In rebuttal, the prosecutor responded that defense counsel was free to present a DNA expert but declined to do so. That led to an objection that was sustained. The court

instructed the jury that the State had the burden of proof and the defense was not obligated to produce any witnesses at all. The prosecutor then turned his attention again to whether the jury should believe Ms. Tolls or the police, telling the jury "Either the police are lying, or Ms. Tolls is lying. If you believe the police, and there's no reason why you shouldn't, because like I said before, they don't have a stake in this outcome other than wanting to do their jobs." No objection was made to that last comment.

Upon the return of the jury's verdicts, appellant filed a motion for new trial – apparently an oral one – in which he complained about the prosecutor's comments to the jury, principally his vouching for the credibility of the police officers but also his remark about the defense having the ability to produce a DNA expert. The prosecutor conceded that those remarks were improper but contended that his remarks were not so severe and that the court gave immediate curative instructions to whatever objections were made. The court ultimately denied the motion but not before admonishing the prosecutor that "your final argument was just walking on the edge the whole time" and that "you crossed the bounds on several occasions."

In his appeal, appellant argues that the prosecutor's vouching for the police witnesses and his comment regarding the ability of the defense to present DNA evidence were legally improper, that they were severe, and that the court's responses were inadequate. With respect to the vouching, the State understandably does not suggest that those remarks were proper but argues that, upon appellant's objection, the error was immediately and adequately cured, that defense counsel did not argue otherwise at the

time, and that a motion for new trial is not the appropriate vehicle to raise such claims. With respect to the DNA comment, the State contends that defense counsel opened the door and that the prosecutor's remark was proper rebuttal.

Counsel are accorded "great leeway" in their closing arguments, but that leeway is not unlimited. Among the things that are out of bounds are (1) vouching for (or against) a witness's credibility and (2) denigrating the State's burden to prove guilt beyond a reasonable doubt and suggesting that the defendant has some burden to prove his or her innocence. In *Donaldson v. State*, 416 Md. 467, 489-90 (2010), the Court, repeating what it had said in *Spain v. State*, 386 Md. 145, 153-54 (2005) noted that a prosecutor's vouching for or against witnesses infringes on a defendant's right to a fair trial as it "places the prestige of the government behind a witness through personal assurances of the witness's veracity" or lack thereof. In *U.S. v. Young*, 470 U.S. 1, 18-19 (1985), the Supreme Court added that such comments

> "can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

It is not a trivial error, even in its general application. The comments "I don't think the police are lying" and "I'm putting my trust in [the police] because they have no interest in the outcome" constitute classic vouching. The comment regarding the police not risking their careers suffers from a separate defect – there is generally no evidence to

support that consequence, and there was none in this case. *Donaldson, supra*, 416 Md. at 492-93; *Sivells v. State,* 196 Md. App. 254, 279 (2010).

With respect to the DNA comment, we reject the State's contention that it was a proper response, under the "opening-the-door" doctrine. That doctrine is predominantly a rule of evidence that allows a party to introduce evidence that otherwise may be inadmissible to respond to evidence put in by the other party, but both the Court of Appeals and this Court have applied the doctrine to opening statements and closing arguments as well. *See Mitchell v. State*, 408 Md. 368, 388 (2009); *Sivells v. State, supra*, 196 Md. App. at 282. As explained in *Grier v. State*, 351 Md. 241, *Sivells v. State, supra*, 196 Md. App. at 282-83, and *Kahn v. State*, 213 Md. App. 554, 573-74 (2013), however, the open door doctrine is limited to "evidence that is competent, but otherwise irrelevant" and does not permit the admission of evidence (or argument) that is inadmissible for reasons other than relevance.

The prosecutor's response here – that the defense could have called a DNA expert – is not of that character. Apart from the fact that the argument to which it supposedly responded was that the police never collected DNA evidence that *could* be examined, it denigrated the State's Constitutional burden of proof and suggested that there was a burden on the defendant to produce evidence. The door has not been opened that wide; nor could it be. The trial court was correct in viewing both sets of comments as improper.

The question, then, is whether those errors require a new trial – whether the court abused its discretion in denying the motion. The standard for determining that was explained in *Donaldson v. State, supra*, 416 Md. at 496-97:

> "We must determine, upon our 'own independent review of the record,' whether we are 'able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.' A prosecutor's improper comments influenced the verdict, and therefore require reversal, if it 'appears that the . . . remarks actually misled the jury or were likely to have misled or influenced the jury to the defendant's prejudice.'" (Citations omitted).

In applying that standard, we look to the facts at hand. In particular, "we consider 'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Id.* at 497 (citations omitted). Rather than consider each improper statement independently, "we look at 'the cumulative effect of all errors on the ability of a jury to render a fair and impartial verdict in the context of the case."

We shall not speculate whether the prosecutor's vouching comments – especially in his rebuttal argument after having been admonished by the judge for what he had said in his opening argument – were in deliberate defiance of the law and the court or the product of inexcusable incompetence. The fact is that it was not just one isolated remark; there were several, an aggravating factor noted in *Donaldson*.[3] Coupled with that was the

[3] The Court in *Donaldson*, responding to the State's reliance on *Spain v. State, supra*, where the Court had affirmed the conviction, noted: "There are, however, significant differences between *Spain* and the present case. Most notably, *Spain* involved only a single instance of improper vouching. . . . We concluded that was 'an isolated event that did not pervade the entire trial. . . . We cannot say the same for the present case, where

wrongful comment regarding the ability of the defense to call its own DNA expert. Added as well is the fact that there was a legitimate dispute over appellant's criminal agency. The prosecutor was correct in telling the jury that the case came down to whether it believed Detective Blanchard or Ms. Tolls. That is one side of the ledger.

On the other side is the fact that each objection made to the improper comments was immediately sustained and, to defense counsel's satisfaction, a curative instruction was given, in one instance a *mea culpa* by the prosecutor and in the others by the court. As we noted, no timely objection was made to the last vouching comment in the prosecutor's rebuttal argument. The fact that defense counsel was satisfied with the responses to her objections, though not determinative, is an important consideration, for two reasons. First, it weighs on the substantive question of whether, given the fix, the improper comments likely would have the effect of misleading or improperly influencing the jury. Second, a timely request for some further relief – some stronger curative instruction – would have afforded the court an opportunity to provide that relief. Waiting to raise the issue in a motion for new trial precludes that remedy and leaves as the only option a new trial.

In ruling on the motion for new trial the trial judge regarded this as a close case and was deeply concerned about the prosecutor's conduct. He noted that it was a three-day trial that he regarded as being thorough and fair, and he expressed his belief that the

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the prosecutor made two separate sets of improper remarks that played an important role in both the closing and rebuttal arguments." (Citations omitted).

jury's verdict was a reasonable one. In the end, he denied the motion "because I think the curative instructions were sufficient to have overcome the possible prejudice."

The decision whether to grant or deny a motion for new trial is a discretionary one. In *Argyrou v. State*, 349 Md. 587, 600 (1998), the Court held that the breadth of that discretion "will expand or contract depending upon the nature of the factors being considered, and the extent to which its exercise depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on his or her own impressions in determining questions of fairness and justice." *See also Jamison v. State*, 450 Md. 387, 412 (2016). Although, in the end, we must determine whether the judge in this case abused his discretion based on our independent review of the record, in making that determination, we must give fair deference to the perceptions of the trial judge, who sat observing the trial for three days and was in a better position to gauge the jury's reactions to what occurred – reactions not recorded in this record but which, in any event, would be more discernable to him than to us. Upon our independent review, we find no error of law and no abuse of discretion in the denial of the motion.[4]

THE *ALLEN* CHARGE

[4] In his rebuttal argument, the prosecutor attempted to respond to defense counsel's "sloppy investigation" argument by pointing out the scarce resources available to the Baltimore City police in light of having to deal with 300 murders a year. An objection was made, and the court, at the bench, admonished the prosecutor that there was no evidence regarding a lack of resources, but no curative instruction was requested, and none was given. Scant attention is given to that in appellant's brief.

At approximately 4:40 in the afternoon of the third day of trial, which was a Friday, the jury, after deliberating for about three hours, sent a note asking "[i]f we are split on our decision, what is the next step? Do majority rules?" The court and counsel considered various options but ultimately, without objection, the court decided to repeat the instruction it had given with respect to requiring that verdicts be unanimous, add an *Allen*[5] charge, and allow the jury to continue deliberations until 6:00 p.m. There was some discussion about sending those instructions back to the jury room, but they were, in fact, given in the courtroom with counsel and appellant present.

The purpose and thrust of an *Allen* charge, when there appears to be a deadlock, is to encourage jurors to consider the views of their fellow jurors and not hesitate to re-examine their own views in an attempt to reach a verdict when convinced that their earlier views may be wrong, but not to coerce them to surrender their honest conviction regarding the evidence merely because of the opinions of other jurors or simply to reach a verdict. In *Kelly v. State*, 270 Md. 139, 144 (1973), the Court of Appeals stated, as a suggested guideline for employment of an *Allen*-type charge, that:

> "After the jury has been sequestered to deliberate, we think it advisable that a trial judge, who decides to give an *Allen*-type charge because of an apparent deadlock, should closely adhere to the wording of the ABA [American Bar Association] recommended instruction. If he [or she] does not, the language selected will be subjected to careful scrutiny in order for it to be determined whether the province of the jury has been invaded and the verdict unduly coerced."

[5] *Allen v. United States*, 164 U.S.492 (1896).

Four years later, in *Burnette v. State*, 280 Md. 88, 98 (1977), the Court confirmed that significant departures from the ABA language would not be tolerated. It said:

> "We do not . . . require that the exact wording of the American Bar Association's approved instruction be the only instruction a trial judge may employ. He [or she] may 'personalize' this charge, adopting minor deviations in language which adjust the charge to the circumstances encountered. This must, however, be done cautiously and in the spirit of the American Bar Association language. Deviations in substance will not meet with our approval. Coercion of the jury for the purpose of breaking a deadlock must be avoided."

Since those cases, the Court of Appeals and this Court have, indeed, carefully scrutinized *Allen*-type instructions that deviate from the ABA language to determine whether the deviation is significant.

The approved ABA language provides, in relevant part:

> "In the course of your deliberations, **do not hesitate to reexamine your own views and change your own opinion if convinced that it is erroneous.** But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

The full instruction given – the reinstruction on unanimity and the *Allen* charge was as follows:

> "The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching a[n] agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors.
>
> During deliberations do not hesitate to re-examine your own views. **You should change your opinion if convinced you are wrong** but do not surrender your honest belief as to the weight or effect of the

> evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict."

The highlighted language shows the difference between the ABA recommendation and the *Allen* instruction given – *do not hesitate* to change your opinion if convinced that it's erroneous *vs*. you *should* change your opinion if convinced you are wrong. Those instructions were given at 4:58 p.m. At 5:25 p.m., the jurors reached a verdict.

Appellant complains that the trial court abused its discretion "when it denied Johnson's repeated motions for mistrial and instead read an *Allen*-type charge to the jury." That is a complete misstatement of the record. Appellant made no objection to either the giving of an *Allen* charge or to the content of the charge and never made a motion for mistrial.

When the jury's last note was received, the court and counsel discussed how best to proceed – whether to give an *Allen* charge, whether to have the jury continue its deliberations that day and if so for how long, and whether to bring the jury back on Monday. The court indicated that it would allow the jury to sit until 6:00 p.m., that it would reinstruct them on the need for a unanimous verdict, and that it also would give them an *Allen* charge. Defense counsel, who clearly did not want the case to carry over to Monday, said "I guess I would be requesting a mistrial *if they don't conclude by six*." (Emphasis added).

The discussion continued about bringing the jury back on Monday, at which point defense counsel said "I would again renew my request for a mistrial . . . *at the end of today's date*." (Emphasis added). As noted, the jury returned its verdicts at 5:25, there

was no further talk about a motion for mistrial, and none was ever filed. Nor was any objection made to the instruction, although defense counsel was in the courtroom when it was read to the jury. Appellant's belated complaint was not preserved, and we therefore shall not address it. Had we addressed it, we would have found no error. The instruction mirrored closely the *Allen* instruction recommended by the Maryland State Bar Association (Maryland Criminal Pattern Jury Instruction (MPJI-Cr. 2:01).

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.